

FREEDOM OF INFORMATION ACT (FOIA)
&
CONFLICTS OF INTEREST ACT (COIA)

PRACTICAL TRAINING FOR THE APPOINTED MEMBER
OF A PUBLIC BODY...

Paul Kugelman, Jr.
Office of the Virginia Attorney General
Senior Assistant Attorney General

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FOIA Overview

FOIA Overview

- Officially titled "The Virginia Freedom of Information Act." and is set forth in Va. Code §§ 2.2-3700 to -3714
- By enacting FOIA, "the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted." § 2.2-3700(B).
- FOIA is to be "liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government." Further, "[a]ny exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt [under FOIA] or other specific provision of law."

Central to FOIA – Public Business

“There is an important distinction to be made between what are matters of public business and what are matters of public interest. . . . [W]hile it may be of interest what our public officials are eating, personal diet in most cases has nothing to do with the public business”

Burton v. Mann, 74 Va. Cir. 471, 474 (Loudoun Co. 2008).

Public business “encompasses those matters over which the public governmental body has supervision, control, jurisdiction, or advisory power.” *Id.*

FOIA – Public Records

"Public records" means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business. § 2.2-3701.

FOIA Request

A request for public records shall identify the requested records with reasonable specificity. The request need not make reference to FOIA in order to invoke its provisions or to impose the time limits for response. Any public body that is subject to FOIA and that is the custodian of the requested records shall respond promptly, but in all cases within five working days of receiving a request.

§ 2.2-3704(B).

FOIA – Public Meetings

In relevant part, a meeting occurs when three or more members (agency employees do not count towards the limit) of a public body assemble, either physically or through the aid of other devices.

§ 2.2-3701.

It is a meeting regardless of whether votes are cast or minutes taken. *Id.*

Except as provided in § 2.2-3711, all meetings of public bodies shall be open to the public. § 2.2-3707(A).

FOIA – NOT a Public Meeting

Under FOIA, it is not a meeting when

- Less than 3 members meet;
- Regardless of how many members are present, so long as
 - no part of the purpose or the conduct of the gathering is the discussion or transaction of public business; or
 - at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at the public forum, candidate appearance, or debate.

§ 2.2-3701.

FOIA – Closed Meetings

§ 2.2-3711(A) provides for a public body to go into a closed meeting under 51 specific circumstances.

Of those, the following may apply here:

- the protection of privacy of individuals in personal matters not related to public business, § 2.2-3711(A)(4);
- consultation with legal counsel and briefings by staff or consultants regarding actual or probable litigation, *id.*(7);
- consultation with legal counsel for a matter requiring legal advice, *id.* (8); and
- discussion or consideration of special awards, *id.*(11).

FOIA – Going into a closed meeting

The procedure for going into a closed meeting is set forth in § 2.2-3712.

In summary, it requires a motion, which must pass; after the closed meeting, the members are polled to confirm that the closed meeting was limited to the stated basis of the motion.

I have provided DMME with a procedure, a template motion, and a template poll.

FOIA – Noncompliance

If the court finds the denial to be in violation of the provisions of FOIA, the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust. § 2.2-3713(D).

In a FOIA violation proceeding commenced against any officer, employee, or member of a public body, the court, if it finds that a violation was willfully and knowingly made, shall impose upon such officer, employee, or member in his individual capacity a civil penalty of not less than \$ 500 nor more than \$ 2,000. § 2.2-3714.

For a second or subsequent violation, such civil penalty shall be not less than \$ 2,000 nor more than \$ 5,000. *Id.*

COIA Overview



COIA Overview

Officially titled “State and Local Government Conflict of Interests Act” Va. Code §§ 2.2-3100 to -3131.

The General Assembly, recognizing that our system of representative government is dependent in part upon its citizens maintaining the highest trust in their public officers and employees, finds and declares that the citizens are entitled to be assured that the judgment of public officers and employees will be guided by a law that defines and prohibits inappropriate conflicts and requires disclosure of economic interests. To that end and for the purpose of establishing a single body of law applicable to all state and local government officers and employees on the subject of conflict of interests, the General Assembly enacts COIA so that the standards of conduct for such officers and employees may be uniform throughout the Commonwealth. § 2.2-3100.

Central to COIA – Misuse of Office

In summary, COIA prohibits accepting anything of value in exchange for influencing you in the use of your office, any opportunity where there is a reasonable likelihood that it is being offered to influence you in the use of your office, and advancing your own or your family's economic interests through the use of your office. *See* § 2.2-3103 (listing prohibited conduct).

Additionally, you are prohibited from participating in a transaction being considered by the public body in which you have a personal interest. *See* § 2.2-3112 (explaining this in far greater detail).

COIA – Personal Interest

"Personal interest" means a financial benefit or liability accruing to an officer or employee or to a member of his immediate family. Such interest shall exist by reason of (i) ownership in a business if the ownership interest exceeds three percent of the total equity of the business; (ii) annual income that exceeds, or may reasonably be anticipated to exceed, \$ 5,000 from ownership in real or personal property or a business; (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business or governmental agency that exceeds, or may reasonably be anticipated to exceed, \$ 5,000 annually; (iv) ownership of real or personal property if the interest exceeds \$ 5,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property; (v) personal liability incurred or assumed on behalf of a business if the liability exceeds three percent of the asset value of the business; or (vi) an option for ownership of a business or real or personal property if the ownership interest will consist of clause (i) or (iv).

COIA – Personal Interest in a Contract

"Personal interest in a contract" means a personal interest that an officer or employee has in a contract with a governmental agency, whether due to his being a party to the contract or due to a personal interest in a business that is a party to the contract.

§ 2.2-3101

COIA – Personal Interest in a Transaction

"Personal interest in a transaction" means a personal interest of an officer or employee in any matter considered by his agency. Such personal interest exists when an officer or employee or a member of his immediate family has a personal interest in property or a business or governmental agency, or represents or provides services to any individual or business and such property, business or represented or served individual or business (i) is the subject of the transaction or (ii) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction.

§ 2.2-3101

COIA – Accepting Gifts

The only instances where you need to pay attention is when you or a member of your immediate family solicit, accept, or receive a gift where:

- (1) The gift is from either
 - (a) a registered lobbyist,
 - (b) a person or entity who hires registered lobbyists, or
 - (c) a person or entity who has or is seeking a contract with an agency over which you have authority to direct the activities of that agency; and
- (2) The gift is valued at \$20.00 or more.

See § 2.2–3101.1 (prohibiting certain gifts).

COIA – Gifts from Personal Friends

Even if a gift is valued at more than \$20.00 and is from one of a lobbyist, etc., you and members of your immediate family may accept gifts without restriction from personal friends.

In determining whether a person is a personal friend, the following factors shall be considered: (i) the circumstances under which the gift was offered; (ii) the history of the relationship between the person and the donor, including the nature and length of the friendship and any previous exchange of gifts between them; (iii) to the extent known to the person, whether the donor personally paid for the gift or sought a tax deduction or business reimbursement for the gift; and (iv) whether the donor has given the same or similar gifts to other persons required to file the disclosure form prescribed in § 2.2-3117 or 30-111.

§ 2.2-3103.1(F).

COIA –Gift Restrictions

Neither you nor a member of your immediate family may solicit, accept, or receive

for yourself or a member of the immediate family

any single gift with a value in excess of \$100 or any combination of gifts within a calendar year with an aggregate value in excess of \$100 (gifts valued at less than \$20 are not aggregated)

that you or a member of your immediate family knows or has reason to know is either (i) a registered lobbyist, (ii) a person or entity who employs a registered lobbyist, or (iii) a person or entity who is or who is seeking a contract with the public body of which you are a member or with a public body over which you have the authority to direct.

§ 2.2–3103.1(C).

COIA – Gift of Travel

You or a member of your immediate family may accept or receive gifts of travel, including travel-related transportation, lodging, hospitality, food or beverages, or other thing of value, with a value in excess of \$100 that is paid for or provided by either (i) a registered lobbyist, (ii) a person or entity who employs a registered lobbyist, or (iii) a person or entity who is or who is seeking a contract with the public body of which you are a member or with a public body over which you have the authority to direct.

So long as you have submitted a request for approval of such travel to the Virginia Conflict of Interest and Ethics Advisory Council and have received the approval of the Council.

Also, this must be reported on a disclosure form.

COIA – Gifts of Food, Beverage, or Entertainment

You or a member of your immediate family may accept or receive a gift valued in excess of \$100

of food and beverages, entertainment, or the cost of admission

when it is accepted or received while in attendance at a “widely attended event” and is associated with the event.

And these are required to be reported on a disclosure form.

§ 2.2-3103.1(D).

COIA – Widely Attended Event

"Widely attended event" means an event at which at least 25 persons have been invited to attend or there is a reasonable expectation that at least 25 persons will attend the event and the event is open to individuals (i) who are members of a public, civic, charitable, or professional organization, (ii) who are from a particular industry or profession, or (iii) who represent persons interested in a particular issue.

§ 2.2-3103.1(A).

COIA – Gift from a Foreign Dignitary

If you or a member of your immediate family are in the position of receiving a gift from a foreign dignitary, please call me to discuss it.

See § 2.2–3103.1(E) (addressing gifts from foreign dignitaries).

COIA – Filing Financial Interest Disclosure Form

An officer or employee required to file the disclosure form prescribed by § 2.2-3117 who fails to file such form within the time period prescribed shall be assessed a civil penalty in an amount equal to \$250.

§ 2.2-3124(B)

COIA – “Knowing Violation”

Any person who knowingly violates COIA shall be guilty of a Class 1 misdemeanor, § 2.2-3120, shall be guilty of malfeasance in office, § 2.2-3122, and shall be subject to a civil penalty in an amount equal to the amount of money or thing of value received as a result of such violation, and the money or thing of value is forfeited. § 2.2-3124.

A knowing violation is one in which the person engages in conduct, performs an act, or refuses to perform an act when he knows that the conduct is prohibited or required by COIA. § 2.2-3120.

COIA – Contracts made in violation may be rescinded

Any contract made in violation of COIA may be declared void and may be rescinded by the governing body of the contracting or selling governmental agency within five years of the date of such contract.

§ 2.2-3123



COIA – Advisory Opinion

A state officer or employee shall not be prosecuted for a knowing violation of COIA if

- (1) the alleged violation resulted from his good faith reliance on either (a) a written opinion of the Attorney General or (b) a formal opinion or written informal advice of the Council;
- (2) it was made in response to his written request for such opinion or advice; and
- (3) the opinion or advice was made after a full disclosure of the facts.
- (4) If the advice or opinion is withdrawn, it can only be relied upon for acts or omissions occurring after its issuance and before its withdrawal.

§ 2.2-3121(A).

Questions?